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Mr. William F. Caton Acting Secretary Federal Communications Commission Washington, D.C. 20554 RECEIVED

JUL 2 2 1994

FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY

Re: GC Docket No. 92-52

Dear Mr. Caton:

On behalf of Richard M. Carrus and Joelmart, Inc., I enclose herewith an original and nine copies of their joint comments on the Commission's Second Further Notice of Proposed Rulemaking in GC Docket No. 92-52.

Should you have any questions concerning this matter, please contact the undersigned.

Very truly yours,

Dennis P. Corbett

Enclosures

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BEFORE THE

Federal Communications Commission WASHINGTON, D.C. 20554

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In the Matter of)	TUL 2 2 1994
Reexamination of the Policy Statement on Comparative Broadcast Hearings)))	GC Docke FED ETION COLORIDATE NO CURAMISSION OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF RICHARD M. CARRUS AND JOELMART, INC.

Richard M. Carrus ("Carrus")¹/, and Joelmart, Inc. ("Joelmart")²/, (jointly referred to herein as "Commenters"), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules, hereby comment jointly on the Commission's Second Further Notice of Proposed Rulemaking, FCC 94-167, released June 22, 1994 ("Second Further NPRM") in the above-captioned proceeding.³/ In the Second Further NPRM, the

Carrus is currently one of four remaining applicants seeking authority to construct and operate a new FM radio station in Port St. Lucie, Florida, File No. BPH-891018MD, MM Docket No. 91-83.

Joelmart is one of five remaining applicants for authority to construct and operate a new FM radio station in Santa Barbara, California, File No. BPH-880301MJ, MM Docket No. 90-218.

As applicants in separate proceedings for authority to construct and operate new FM radio stations, Commenters both have direct interests in the outcome of the instant proceeding. As the records in each of their cases reflect, both applicants have expended considerable time, effort, and

Commission requests comment on the impact of the recent holding of the U.S. Court of Appeals for the District of Columbia Circuit in Bechtel $II^{4/}$ on the Commission's proposed modification of the criteria used in comparative hearings to award construction permits for new broadcast facilities. $^{5/}$

The <u>Second Further NPRM</u> interprets the Court's decision in <u>Bechtel II</u> as requiring that the Commission cease use of the integration of station ownership into management as a criterion in evaluating all applicants for new broadcast facilities. ⁵/
Given the central importance of the integration criterion in comparative broadcast hearings prior to <u>Bechtel II</u>, the

Commission is now facing a wide range of questions about the criteria it will use in the future in comparative cases, as well as questions concerning the retroactive application of any such criteria to pending cases. While Commenters here take no position on the retroactive application issue, they believe the new criteria should remedy one problem that has been recurrent in

resources in pursuit of their respective construction permits.

<u>4</u>/ <u>Bechtel v. FCC</u>, 10 F.3d 875 (D.C. Cir. 1993) ("<u>Bechtel II</u>").

See generally Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 F.C.C.R. 2664 (1992) ("NPRM"); 8 F.C.C.R. 5475 (1993) ("Further NPRM").

<u>6/ See Second Further NPRM, FCC 94-167, slip op. at 1.</u>

comparative broadcast hearings during the last decade or so. Specifically, consistent with the spirit of <u>Bechtel II</u>, the Commission should repeal the doctrine established by <u>Anax</u>

<u>Broadcasting, Inc.</u>²/ In other words, the Commission should no longer differentiate between the interests of limited and general partners in a limited partnership or between holders of voting and non-voting equity in a corporation in determining control of a proposed licensee in a comparative hearing.⁸/

The Commission Should Declare the <u>Anax</u> Doctrine A <u>Failed Experiment and Abolish It.</u>

The Commission found in the <u>Policy Statement</u> on <u>Comparative Broadcast Hearings</u>, 1 F.C.C.2d 393, 394 (1965) ("1965 Policy Statement"), that the integration of station ownership into management promoted its goal of providing the "best

<u>1</u>/ <u>Anax Broadcasting Inc.</u>, 87 F.C.C.2d 483 (1981) ("<u>Anax</u>").

Commenters do not hereby address the Commission's treatment, under its multiple ownership rules or in such areas as tax certificate policy, of passive ownership interests in existing permittees and licensees. Commenters recognize that such rules and policies are beyond the scope of this proceeding and that very different considerations can lead an existing permittee or licensee (who is not trying to structure an application for litigation purposes) to employ passive ownership mechanisms. Commenters here challenge only the wisdom of recognizing passive ownership structures in comparative hearings for vacant broadcast allotments.

practicable service to the public, "because "there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station." The Commission also concluded that integration "frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership." For these reasons, the Commission decided to award "integrated" applicants a substantial preference in comparative hearings. 11/

In holding that the Commission's integration policy is arbitrary and capricious, the <u>Bechtel II</u> court found that the Commission had no evidence that the policy actually promoted the ownership participation in management that the Commission sought to foster. Rather, the court found, the policy merely gives applicants in comparative hearings an "incentive to create a facade of integration." This incentive arises both from the

<u>9</u>/ <u>1965 Policy Statement</u>, 1 F.C.C.2d at 395.

^{10/} Id.

^{11/} Id. at 395-96.

^{12/} Bechtel II, 10 F.3d at 887.

^{13/} Id.

substantial advantage that an integration preference gives an applicant over its competitors in a comparative hearing, 14/ and from the sizable profits that a licensee stands to reap from a quick resale of its license. 15/ While Commenters believe that the integration criterion can confer public interest benefits where the applicants seeking a construction permit have bona fide business structures, and Commenters believe further that the Commission could attempt to remedy the "quick resale" problem through appropriate regulation and oversight, it is the Anax doctrine that has spawned so many of the "facades" which so troubled the Bechtel II Court, and the doctrine should be repealed accordingly.

In <u>Anax</u>, the Commission held simply that "we do not consider the interests of limited partners relevant to

^{14/} See id. at 881.

See Bechtel v. FCC, 957 F.2d 873, 880 (1992) ("Bechtel I") (describing the Commission's decision to permit new licensees to sell their stations without a hearing after operating them for only a year); Bechtel II, 10 F.3d at 886 (noting that "if a station can be acquired for legal fees and minor engineering services, and can be sold a year later for several million dollars, one would expect to see a good deal of ingenuity" in the structure of applicants.) The Commission is currently considering an amendment to 47 C.F.R. § 73.3597(a)(1) to require that successful applicants in comparative proceedings operate their stations for three years before they become eligible to transfer them. See Further NPRM, 8 F.C.C.R. at 5475.

determining the integration credit. "16/ As the Commission explained:

The purpose of integration is to foster sensitivity to the local community and to strengthen the bond between legal responsibility and day-to-day management authority. Integration tends to accomplish these goals because those individuals who control the licensee participate in station operations on a day-to-day basis. As the limited partners are passive investors and have no authority to control the licensee, their integration or lack of integration is inconsequential. 17/

Although the <u>Anax</u> policy may have been intended to make more capital available to parties with genuine interest in building and managing broadcast stations, the "real world" effect of the <u>Anax</u> policy has been quite different.

Plainly stated, the <u>Anax</u> policy has produced a plethora of fraudulent applications, painstakingly chronicled in the case law of the last decade. It has in fact caused a massive expenditure of resources in the hearing room by parties who have been forced again and again to expose artificial business structures. Because, for purposes of the integration criterion, the Commission measures ownership of an applicant by focusing on

Anax, 87 F.C.C.2d at 488. The policy has subsequently been applied to holders of nonvoting equity in applicant corporations as well. See Bechtel II, 10 F.3d at 883.

 $[\]frac{17}{\text{Anax}}$, 87 F.C.C.2d at 488 (citations omitted).

voting power rather than equity interest, 18/ the policy "made it possible for an applicant to receive 100% credit for integration of ownership into management even when . . . only a fraction of total ownership was actually represented in management." When combined with the right to resell a station license after one year, the Anax policy provided speculators with a rare opportunity:

After these changes, an applicant largely financed by passive investors, but who promised to manage the station, could qualify for full integration credit, get the license for that reason, and then, after only a year, turn around and sell it to anyone without regard to the buyer's "integration" or lack thereof. $\frac{20}{}$

Nominally "passive" investors could further enhance their chances of receiving a license by joining forces with an "active" manager who was a member of a minority group, as minority status was a "qualitative factor" to be added to any integration credit that an applicant received. Even if the original applicant chose not to resell the license, the "active" manager could turn management of the station over to the limited partners or

^{18/} See Bechtel II, 10 F.3d at 883.

^{19/} Bectel I, 957 F.2d at 880.

 $[\]frac{20}{\text{Id}}$.

^{21/} See Bechtel II, 10 F.3d at 881-2.

nonvoting shareholders with little fear that the Commission would hold it to its original promises. $\frac{22}{}$

It should be no surprise that the Anax doctrine has resulted in the proliferation of two-tiered partnerships and corporations, formed for the sole purpose of competing for a particular license. An alarmingly high number of such entities have worked a fraud on the Commission and the public, as they have been formulated to look "good on paper" under the comparative criteria, while being totally divorced from business reality (e.g., savvy passive investors professing to "give away the store" to total strangers who hold the active ownership interest). As such entities are permitted ultimately to sell the licenses that they acquire to professional broadcasters in transactions that are not subject to close Commission scrutiny, the policy also indirectly promotes excessive concentration of control of broadcast facilities rather than the diversification of the media of mass communications sought by the Commission.

See id. at 885. The court found that "[i]n calculating the hours to be worked by each applicant-owner . . . the Commission usually takes the prospective owner's word at face value, even though it knows that the promise is likely made in large part to please the Commission, that the Commission will do little or nothing to enforce the promise, and that the promise therefore may quite possibly be bogus."

Anax doctrine. In keeping with the court's criticism of the doctrine in Bechtel II, 23/ the Commission should focus on overall equity share rather than promised voting power in measuring ownership and control of applicants for broadcast licenses. No partner, whether general or limited, and no holder of equity, whether voting or non-voting, should be treated as invisible for the purposes of the Commission's evaluation in comparative hearings. By means of such a change in its policies, the Commission will take a major step toward alleviating the concerns which so animated the Bechtel II Court.

Conclusion

For the foregoing reasons, Commenters urge the Commission to repeal its <u>Anax</u> doctrine, and to consider both limited and general partners in partnerships and holders of

^{23/} See id. at 883.

voting and non-voting equity in corporations for purposes of determining control of an applicant in comparative broadcast hearings.

Respectfully submitted,

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July 22, 1994

Their Attorneys

CERTIFICATE OF SERVICE

I, Niambi B. Davis, hereby certify that true and correct copies of the foregoing "Comments of Richard M. Carrus and Joelmart, Inc." were sent by first-class postage prepaid mail this 22nd day of July, 1994, to the following:

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